SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 34

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

RAYMOND WOOD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR REHEARING.

The present petition for rehearing of this Court's decision, entered December 7, 1936, is respectfully presented for the following reasons:

This Court in the first paragraph of its opinion (p. 3) states that neither the present case nor the present Statute involves any question of actual bias. Later in the opinion this Court states that the present law "permits full inquiry as to actual bias" in the exceptional cases wherein a juror might have a special interest, as, for instance, where in a trial for counterfeiting he was an employee of the Treasury Department (Op., p. 15). We infer, therefore, that this Court has arrived at the decision herein, at least in

part, upon the theory that in any prosecution involving the particular Department or Division wherein a particular juror is employed, it would be competent for counsel for the defendant to challenge the juror for cause on the basis of his employment in the particular Division, or that the trial judge, of his own motion, could exclude the particular juror in such a case.

We respectfully invite the attention of the Court to the fact that the Statute itself prevents any such challenge for cause. It states:

> "All other persons, otherwise qualified according to law * * * shall be qualified to serve as jurors in the District of Columbia *and shall not be exempt from such service.*"

The Statute is all-inclusive: there is no exception in favor of Government employees employed in the particular Department or Division wherein the crime may have occurred. Nor is the phrase "otherwise qualified according to law"[1]

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[1] The phrase obviously refers to the technical qualifications of jurors set forth in Title 18, Section 357 of the D. C. Code, 1929; Section 215, D. C. Code, 1901, reading as follows:

> "357. Qualifications of jurors.—No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude. (Mar. 3, 1901, 31 Stat. 1223, c. 854, sec. 215)".

The proof that a person employed in the particular Department or Bureau could not be excused on the ground that he was not "otherwise qualified according to law" is the fact that the latter phrase anti-dates in point of time the selection of the names of jurors by the Jury Commission under Section 347, D. C. Code, 1929. The Jury Commission obviously has nothing whatever to do with the ascertainment of actual bias. The phrase, therefore, "otherwise qualified according to law" is a mandate addressed to the Jury Commission not to the trial Court and seems to have no application whatever to the form of "actual bias" seemingly recognized by this Court in the case of employment in the particular Department or Bureau involved.

of assistance in enabling a court to read into the Statute a disqualification for so-called *actual* bias where the employee is employed in the particular Bureau near the seat of the crime. The mere *fact* of such employment no more raises the presumption of actual bias than in the present case. In a case of this character no judge would permit a challenge for cause on the basis of the mere *fact* of employment in the particular Bureau. He would be compelled to inquire further and ask the juror whether in view of his employment in that particular Bureau he still felt that he could give the defendant a fair trial. If he answered "Yes", this would end the matter, and the judge could not consistently and under the law excuse him. Yet according to this Court seemingly the juror should be excused. Of course, the judge might, throwing law to the winds, excuse the juror in question, but we are not dealing here with matters of grace but matters of legal right. Present counsel participated in a conspiracy trial not long ago wherein two employees of the Income Tax unit were charged with conspiring with an outside auditor. A juror employed in the Income Tax unit of the Bureau of Internal Revenue was called and challenged for cause on that basis, a challenge which this Court seemingly has indicated in its opinion should be allowed. The court promptly overruled the challenge stating that the mere fact of the juror's employment did not show any actual bias. Later when all peremptory challenges had been exhausted (principally in removing from the jury other Government employees) the trial judge called counsel to the bench and made the following statement in substance:

> As to juror number 12, employed in the Income Tax unit of the Bureau of Internal Revenue, your challenge for cause, is, of course, no good. However, I think it would be fairer if I did not allow him to sit and accordingly I will excuse him.

And the judge excused him. But this, of course, is not government by law, it is government by the toe of the Chancellor. It was a pure act of grace on the part of the judge and in fact amounted to a disregard of an Act of Congress.

Defendants in criminal cases ought not to be compelled to depend upon a trial judge's disregard of the plain mandate of a Federal Statute for the safeguards of an "impartial" jury within the meaning of the Sixth Amendment. We go further and say we ought not to have to depend upon any act of grace on the part of the trial judge or any "discretion" whatsoever in achieving the safeguards of our essential liberties.

As to the question to be asked the employee of the particular Department, "In spite of this could you give the defendant a fair trial?" it is obvious that, as pointed out in respondent's main brief herein, the juror's response answers at once everything and nothing. First of all the question invites the answer "Yes, I can give him a fair trial" as all jurors are quick to rebut the suggestion that they could possibly be unfair. In addition, all the arguments stressed by this Court in *Crawford* v. *United States*, 212 U. S. 183, as to bias being an elusive condition of the mind flowing from interest, and interest flowing from employment, come into play. Seemingly in the opinion of this Court these arguments are still applicable to a case wherein the employee works in the particular department having a primary interest in the case, such as in the instance given in the opinion, a case of counterfeiting involving the Treasury Department.

Any practice introduced to permit a trial judge to protect the interests of the accused as he alone determines and in his discretion sees fit, produces not only confusion in the mind of the defendant but positive disadvantage to his serious detriment in obtaining an impartial jury in accord with his constitutional rights. Assume a practical example,

common in our District Court below. This Court, in its opinion (p. 15), says of a case in which a Government employee might have a special interest, "But when we consider the range of offenses and the general run of criminal prosecutions, it is apparent that such cases of special interest would be exceptional." There is nothing in the record to warrant this assumption. The fact is nearly every case of major importance tried in our District Court is one which "*might be of special interest to employees in certain Government departments.*" (Italics ours.) (P. 15, Opinion, this Court.) Such cases are not exceptional. They are not uncommon. Every term of the criminal court has one, several or many upon its docket. They create a very marked public interest. Newspaper comment and report attract wide attention and pronounced divergent views in jurors possible to be drawn later to determine the merits of the accusation, the guilt or innocence of the accused. Postulate the protection of the defendant in his right to challenge for cause one drawn for the jury whose opinion is so fixed it would require evidence to remove it, the fact still remains as a practical, not theoretical or imaginary experience, in such cases the majority of the panel called respond in the affirmative to the question whether they have read or heard of the case and are usually accepted upon their assurance they have no opinion and can give the defendant a fair and impartial trial, only, no doubt, to have their then latent recollections and their subconscious bias, perhaps, awakened and refreshed when the testimony for the prosecution, of which they are not informed upon the *voir dire,* explained in the opening statement for the Government or elicited in the trial. Every defendant in such a case is put to most serious concern, but modern conditions have stamped the law into the mold of their demands. The accused must face them as best he can. Add to this the very dangerous precedent of permitting Government employees

to be drawn and qualified to sit as jurors in such a case. No longer is it one in which the United States acts as a mere formal prosecutor, the sovereign representative of the people of the District of Columbia, proceeding against the accused in the interests of public order and the preservation of the public peace, private property, life, and good government. That cloak has fallen from its shoulders. The mantle has been cast aside. The prosecutor is no longer a formal, sovereignty representative merely. The United States has an actual, deep, serious, determined self interest in the case now. It has been attacked directly by the accused with respect to its orderly functions of government; its property has been stolen or injured; its direct mandates have been broken, flaunted; in all its sovereign dignity it approaches one of its own tribunals and as a direct, injured, demanding suitor calls upon the Court, at its own instigation, to punish the accused. Government can function only through its officers, its employees. Their living and that of their family, their ambitions to promotion, advancement, higher compensation, their very happiness in life depend on the preservation of their Government and the continuance of their employment in a way peculiar and entirely distinct from the ordinary prospective juror whose existence is not so directly related to the Government and its operations. Is their interest in such a prosecution "remote," "minute," "chimerical," or is it definite, certain, present—at least if the evidence, of which they are ignorant when sworn, developes a situation in which their own department or even they or he so sworn, may be put under suspicion, or under regulations to be passed thwarting and hampering the chances either of retention of present position or advancement to a better. These are not fanciful assumptions. They are not imaginary hypotheses put forward with no experience to assure their expression or actuality to affirm

their true existence. Any trial lawyer, called to the defense of an accused in such a case must be shocked to find facing him or his clients as judges of the facts jurors directly interested in the very department or sovereign in and by which they are employed. If one can sit, so may twelve and the guarantee of an impartial jury becomes a spectacle of the prosecutor's own selected panel judging one accused of violating the prosecutor who can hire, fire, degrade not only them but through them their families as well. Such a spectacle ought not to be permitted under our system of government with its constitutional protections enacted deliberately to prevent the very existence of just such a spectacle. To revert to the dark days of the Year Books and Commentators who recorded and commented upon the rights of an accused in the period of the growth of our criminal law is but to relegate the defendant to a theory of the criminal law incompatible with our notion of justice, to strip him of the shield and armor given him by our constitution and send him to an unwarranted conviction, perhaps, while outwardly still retaining the form of those constitutional guarantees. The fact is we would be but enforcing the philosophy of centuries ago, foreign to every concept of an impartial jury. Of the reasons underlying the cases cited in the Year Books and by the Commentators, *cessante ratione cessat ipsa lex* is applicable. Blackstone should be followed, it is submitted. The Colonists knew his work. Burke in his great speech on America noticed the fact that more copies of *Blackstone's Commentaries* were sold in the American Colonies than in England itself. His pronouncement is in direct accord with respondent's contention and the opinion of this Court in the *Crawford* case. It is in accord with a fair interpretation of an impartial jury when analyzed in connection with an Act of Congress which is so broad in its terms as to permit a Government employee to

sit on a jury in a case wherein the United States is the party prosecuting and directly and intensely interested to see that its sovereignty and its laws remain inviolate.

To revert—Is the protection still afforded under the Act in question by inquiry on the *voir dire* of the juror's actual bias and the Court's power in its discretion to secure an impartial jury by excusing for no reason a Government employee in any of the many cases presented wherein the United States is actually the interested prosecutor, sufficient to protect the defendant on his trial? Assume the practical, not the theoretical. Under this Court's opinion, the trial judge may or may not excuse the employee. No law compels him thus to excuse. His discretion may vary in its judgment from that of another judge. The danger of it all is the judge may have no sufficient grounds presented upon which he may exercise his discretion rationally. He will attempt to protect the rights of the accused undoubtedly. His oath requires him to do so. But the facts may fit neither his desire nor his oath—and they probably will not, due to no fault imputable either to the Court or the prospective juror. Assume the trial of a case in which the United States is directly interested about to begin. The tentative panel is in the box. On it six Government employees have been called, several "in the very department to the affairs of which the alleged" offense related. Under the opinion of this Court no principal challenge lies for the defendant and the Court must deny one if interposed. Asked if each has any actual bias, each replies in the negative—and honestly. None knows what the prosecution will present in proof of the accusation. Each honestly believes he could give the accused a fair and impartial trial. Defendant's counsel in genuine concern over this spectacle of employees called to sit on the jury exercises his right of peremptory challenge to each and to his dismay the Court calls additional employees until he is driven to exhaust his

peremptory challenges in excluding them from the jury. While his challenges are given to reject not to select, counsel is now shorn of further protection for his client except his challenge to the juror which he finds no ground to exercise. In this situation the Court is called upon to exercise its discretion. Assume five Government employees have been selected. Each has answered he can give the defendant a fair and impartial trial—and not one knows whether he can or cannot. He has not heard and does not know the evidence. It may disclose facts on the prosecution so detrimental to the accused with respect to his conduct in relation to the affairs of the department in which the jurors—or some of them are employed—that a bias of which none thought he possessed immediately arises preventing a fair and impartial acceptance or analysis of the accused's evidence offered in his own defense. A reality establishing the inherent danger of permitting our jury system thus to be endangered with respect to its impartiality. But the Court is likewise ignorant of the evidence. It has only the answers of the prospective jurors before it that each can give the defendant that fair trial which none can certainly be able to afford. In this situation the Court has little to justify the exercise of discretion. He may or may not excuse one or all of the employees. If he does not, the defendant then is in jeopardy indeed. If he does, the defendant is disadvantaged, in another particular. He no longer possesses principal challenges. They have been exhausted in rejecting former employees drawn tentatively for service. He must now accept any juror called to replace those excused. His challenges "to the juror" alone protects him. Obviously, therefore, under any theory of practice to be followed in accordance with the opinion of this Court, the defendant is confounded in his effort to obtain an impartial jury and disadvantaged in the actual, practical conduct of his defense.

It is apparent more is involved in this issue than "readjustments of procedure consistent with the spirit and purpose" (opinion, p. 12) of the administration of criminal law; that the interest which it may be possible for a juror to possess and still be qualified to sit in any and every case in which the United States is a party directly interested is entirely distinct "from an interest which is only theoretic or imaginary, or which is so remote and trifling and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual * * * " (opinion, pp. 13, 14). Neither is the interest or bias imputed to the Government employee sitting in such a case comparable to that of "all storeowners and householders in cases of larceny or burglary" (opinion, p. 15). The interest of such as owners of property stolen or persons outraged may well permit their testimony as witnesses on the stand but that such should sit upon juries where their own rights are so closely involved is one of doubtful propriety, to say the least where one is charged with the theft of their property or burglarious entry into their homes. The interest of the employee in cases directly involving the interest of the Government as in the *Crawford* case or the many cases arising each year in our District Court for trial is not "artificial, visionary or trifling." It is real and strikes at the very roots of that impartiality which should be secured for every accused under our form of government with respect to the integrity of our jury system. It is not every case in which a Government employee, perhaps, should be disqualified from service as a juror. No lawyer, perhaps, would fear a trial before twelve Government employees as the jury where, as in this case, the United States has no interest further than to protect the public welfare of its citizens. If the Act went no further, the applicable contention of the respondent might be classi-

fied within the rationale of the *Massachusetts* case cited in this Court's opinion. The vice of the Act is the breadth and scope of its provisions, qualifying and enabling Government employees to sit in all cases in which the United States is a party, whether directly interested or not. No such legislation, striking as it does not at form or procedure, not at rights ceded by the defendant but asserted by him, should be permitted to destroy the very substance and integrity of our jury system which has been guarded so jealously by this Court since the Sixth Amendment was adopted.

Because of the impotence of the defendant if the present Statute is sustained we feel, on the basis of this Court's opinion, that a defendant will have no relief in cases of actual bias or bias so close to actual bias as to amount to a moral certainty of it. We ask, therefore, a re-examination of the present case on this theory.

Respectfully submitted.

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I hereby certify that the above petition for rehearing is filed in good faith and not for purposes of delay.

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